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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the matter of
Implementation of Section 26 of the
Cable Television Consumer Protection
and Competition Act of 1992

Inquiry Into Sports Programming
Migration

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PP Docket No. 93-21

To: The Commission

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OPPOSITION TO PETITION FOR CLARIFICATION

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September 16, 1993.

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OPPOSITION TO PETITION FOR CLARIFICATION

The Association of Independent Television Stations, Inc. (INTV) hereby files in response to the Petition for Clarification filed by Capital Cities/ABC, Inc. and ESPN, Inc. (ABC/ESPN) in the above captioned matter.

To a limited extent, INTV agrees with ABC/ESPN that the FCC need not, and perhaps should not, specifically adjudicate the issue of whether any particular contract violates the antitrust laws. That job is more appropriately within the province of the courts or the Federal Trade Commission.

Nevertheless, the Commission has the authority, indeed the obligation, to craft regulations or recommend legislation that fosters competition and diversity in television broadcasting. This obligation exists even in the absence of an adjudicated antitrust violation. The FCC's authority in this area is undisputed and is at the core of its authority to develop communications policy. The Supreme Court stated this fact emphatically when it upheld the FCC's chain broadcasting rules in National Broadcasting Co., v.

United States, 319 U.S. 190, 223-224 (1943). In this regard, the FCC can look to antitrust principals when determining whether the public interest standard will be served by a proposed action. United States v. Radio Corporation of America, 358 U.S. 334 (1959).

Section 26 of the 1992 Cable Act is fully consistent with these basic principals. Congress has asked the FCC to examine the issue of sports migration and preclusive contracts. The underlying justification for the study is to examine whether such events are inconsistent with fundamental communications policy objectives - - promoting diversity and competition.

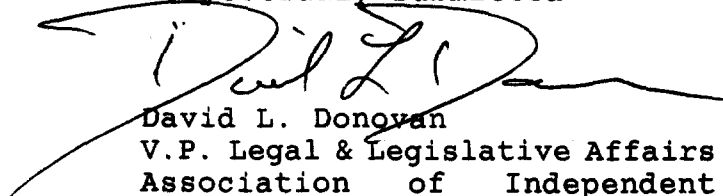
Accordingly, while INTV believes that ABC/ESPN may be correct with regard to the FCC adjudicating the status of these contracts under the antitrust laws, the Commission is certainly within its rights to conduct a full scale investigation of preclusive contracts in general and the ABC/ESPN contracts with the CFA and Major League Baseball. Many of the facts developed in such an investigation are directly relevant to the FCC's communications policy concerns. This is especially true given the time honored maximum that antitrust considerations are important in determining whether the contracts in question are consistent with the public interest.

ABC/ESPN's Petition implicitly raises another important point. When investigating these contracts, the FCC is not limited to strict antitrust analysis. While antitrust considerations are an important component of any public interest analysis, the FCC's communication policy concerns are far broader. The FCC has often enacted rules to promote competition and diversity even though

there is no adjudicated antitrust violation. See FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). The entire 1992 Cable Act is an example of Congress empowering the FCC to remedy actual and potential anticompetitive abuses by the cable industry even though there have been no specific adjudicated antitrust violations. Thus, it is entirely appropriate for the Commission to propose corrective action with respect to preclusive contracts even though these contracts have not been adjudicated under the antitrust laws. If such contracts are found to impede competition and diversity or result in sporting events leaving free over-the-air television, then the FCC can make legislative recommendations and enact policies to correct the situation.

In sum, INTV does not oppose ABC/ESPN's clarification suggesting that the FCC should not specifically adjudicate its contracts under the antitrust laws. However, we oppose any attempt to limit the scope of the FCC's inquiry. Moreover, the FCC should make it clear that it has the authority to find that ABC/ESPN's contracts and similar arrangements by other entities are inconsistent with sound communications policy principals and the public interest.

Respectfully submitted



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September 16, 1993.

Certificate of Service

I hereby certify that on this 16th day of June 1993, copies of the enclosed Opposition to Petition for Clarification were served by first class mail to counsel for Capital Cities/ABC, Inc. and ESPN, Inc.

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